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SAN KONG LETRIK SDN. BHD.

v.

LEMBAGA LETRIK NEGARA TANAH MELAYU & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR

ZAKARIA YATIM J

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[SUIT NO. C3847 OF 1984]

2 JULY 1991

ARBITRATION: Power of the Court to give relief where dispute involves fraud - Discretion of Court to refuse stay of proceedings - Claims in tort cannot be referred to arbitration - Arbitration Act 1952, ss. 25(2), (3).

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CIVIL PROCEDURE: Application to stay proceedings - Whether proceedings frivolous, vexatious and an abuse of the process of the Court - Whether proceedings should be referred to arbitration - Power of Court to refuse stay - Rules of the High Court 1980, O. 18 r. 19(1).

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CONTRACT: Refusal to issue certificates for payment - Claims for sums due under the contract - Alternative claims for damages for negligent and fraudulent conduct of agent.

TORT: Claims for damages for negligent and fraudulent conduct of agent - Misrepresentation - Inducing contractor to carry out additional works - Whether cancellation of directive to carry out additional works dishonest - Whether representations made fraudulently or recklessly - Fraud of an agent.

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On 4 May 1983, the plaintiff company (S) entered into an agreement (the Bersia contract) with the first defendant (D1), under which S agreed to carry out electrical lighting works for the Bersia Hydro Electric project, on certain terms and conditions. On the same date, the two parties entered into another agreement (the Kenering contract), which was related to the Bersia contract, under which the plaintiff also agreed to carry out electrical lighting works in another designated area. The second defendant (D2) was an engineer appointed by D1 to supervise the works carried out by S.

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In April and May 1983, D2 instructed S in writing, to carry out various additional works on both the Bersia and Kenering contracts. The quantity and price of these additional works had been agreed to between S and D2 and these additional works were completed, measured and valued. Part payment was made for the additional works on the Bersia contract. Subsequently, however, D2 refused to issue interim certificates for the balance of the Bersia contract and refused totally to issue certificates for payment for the additional works on the Kenering contract.

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On 27 and 28 December 1983, D1 took over works under the Bersia and Kenering contracts. S alleged that D2 refused to issue the takeover certificates.

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S claimed payment of the aggregate sums under the Bersia and Kenering contracts and in the alternative, S claimed against both defendants, jointly and severally, these sums as being damages suffered in consequence of the negligent and fraudulent conduct of D2 as agent of D1.

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D2 alleged that S had failed to complete the works within the prescribed time, that it had not applied for extension of time to complete the works and therefore, it had not been possible to issue the final certificates.

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a Other sources referred to:

Halsbury's Laws of England, 4th Edn., Vol. 2 at p. 291
Atkin's Encyclopedia of Court Forms, 2nd Edn., Vol. 6 at p. 79
Halsbury's Laws of England, 4th Edn., Vol. 4 at p. 675
Russel on the Law of Arbitration, 20th Edn., p. 187.
Hudsons Building & Engineering Contracts, 8th Edn., at p. 291

b**JUDGMENT****Zakaria Yatim J:**

There are two applications before this Court. The first application is by the second defendant. In this application he seeks the order of the Court in terms of the following prayers:

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- (a) that this action be stayed under O. 18 r. 19(1) of the Rules of the High Court, 1980 on the ground that it is frivolous, vexatious and is an abuse of the process of the Court.
 - (b) that the filing of the defence by the second defendant be deferred until the hearing of this application;
 - (c) that the costs of this application be provided for.
- d** The second application is by the first defendant and in that application the first defendant is asking for the following order:
- (a) that the proceedings be stayed pending the reference of the plaintiff's claim herein to arbitration;
 - (b) that the first defendant be allowed to file its statement of defence after the disposal of the arbitration proceedings;
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- (c) that the costs of and incidental to this application be paid by the plaintiff.

Both applications were heard in chambers. After hearing both Counsel for the first and second defendants as well as Counsel for the plaintiff, I dismissed both the applications with costs. On the application of Counsel for the first and second defendants, I adjourned the matter into open Court for further argument.

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The plaintiff is a limited liability company incorporated in Malaysia and has its registered office at No. 48, Jalan Tapah Kaw, Klang, Selangor. The first defendant is a body corporate established under the Electricity Act 1949 whose main office is at No. 129, Jalan Bangsar, Kuala Lumpur. The second defendant is a limited liability company incorporated in Canada and has its head office at No. 620, Dorchester Boulevard West, Montreal, Quebec, Canada and carries on business in Malaysia at Ground Floor, Wisma Damansara, Jalan Semantan, Kuala Lumpur.

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I shall consider the second defendant's application first.

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The plaintiff's case as pleaded in the statement of claim is as follows: By a contract No. 5734/25 Bersia Lighting dated 4 May 1983 (hereinafter referred to as "the Bersia contract") entered into between the plaintiff and the first defendant, the plaintiff agreed to carry out electrical lighting works as specified in the bills of quantities and specifications at the Bersia Hydro - Electric project on terms and conditions contained therein at the contract price of RM596,216. On the same date, a second contract, contract No. 5734/25 Kenering Lighting (hereinafter referred to as "the Kenering contract"), which is related to the Bersia contract, was entered into between the plaintiff and the first defendant. Under the Kenering contract

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the plaintiff agreed to carry out electrical lighting works as specified in the bills of quantities

and specifications at the Kenering Hydro-Electric project on terms and conditions contained therein at the contract price of RM773,556. The second defendant was the engineer appointed by the first defendant under both the contracts to supervise the works under the contracts and give all instructions and orders thereunder to the plaintiff on behalf of the first defendant.

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Sometime in April and May 1983, the second defendant, on a number of occasions directed the plaintiff in writing, to carry out additional works under both Bersia and Kenering contracts. The quantity and the price of the additional works to be carried out had been agreed upon between the second defendant and the plaintiff and the price was in conformity with the schedule of prices in both contracts.

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The plaintiff avers that it has completed the said additional works under both the contracts as directed by the second defendant. The second defendant has measured and valued the said additional works done under the Bersia contract at RM498,158 and has issued interim certificates for part of the additional works done and the first defendant has made part payment amounting to RM278,644.40. The plaintiff alleges that subsequently, the second defendant wrongfully cancelled the directive for all additional works under the Bersia contract and refused to issue the interim certificate for payment for the balance of the additional works done. The plaintiff further alleges that the second defendant has also measured the additional works done under the Kenering contract, the value of which is RM464,596.50 but has wrongfully failed to issue the interim certificates for payments.

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The plaintiff claims that it has also completed the original works under both the contracts, except for the emergency lighting work which was held back at the request of the second defendant. Subsequently, the plaintiff carried out the emergency lighting work on the instruction of the second defendant. The plaintiff duly applied to the second defendant for the necessary interim certificates under both the contracts. The plaintiff alleges that the second defendant has acted improperly and unfairly and has failed to exercise its own judgment, and in collusion with the first defendant, has wrongfully withheld some of the necessary interim certificates for payment for work done under the original contracts and in respect of the additional works.

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According to the plaintiff, the first defendant has taken over the works under the Bersia contract on 27 December 1983 and under the Kenering contract on 28 December 1983 but the second defendant has wrongfully refused to issue the takeover certificates.

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The plaintiff's claim against the first defendant is the aggregate sum of RM475,152.47 under the Bersia contract and the aggregate sum of RM501,178.87 under the Kenering contract. In the alternative, the plaintiff claims against the first and second defendants jointly and severally the sum of RM475,152.47 and RM501,178.87 respectively being damages suffered by the plaintiff in consequence of the negligent and fraudulent conduct of the second defendant as agent of the first defendant. The particulars of negligence and or fraud are as follows:

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- (i) The second defendant directed and represented to the plaintiff through the various telexes, letters, supply and delivery schedules and confirmation orders referred to in para. 7(a) and (b) hereof that the plaintiff was to carry out the said additional works under the Bersia and Kenering contracts.
- (ii) Acting on the faith and truth of the representation and induced thereby the plaintiff carried out the additional work under the said Bersia and Kenering contracts.
- (iii) The fact is that the said representation was untrue in that the second defendant had no intention of honoring the said directive and has

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- a* (a) dishonestly cancelled the directive for additional work under the Bersia contract after the additional work was completed,
- (b) dishonestly maintains that no directive for additional work has been issued under the Kenering contract.
- (iv) The defendant made the said representation fraudulently and either well knowing they were false and untrue or recklessly not caring whether they were true or false.

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The second defendant, in his affidavit in support of the application avers that the plaintiff has not been able to complete the works within the prescribed date. He says that the plaintiff has failed to apply for extension of time to complete the works. As the works have not been completed the second defendant has not been able to issue final certificates. He denies that the plaintiff is entitled to the sums claimed by the plaintiff. The second defendant says that

c under Clause 38 of the contracts, the plaintiff must refer any dispute to it as the engineer.

In its affidavit affirmed on 17 January 1985, the plaintiff avers that the approval for the installation of the emergency lighting system has not been given by the second defendant to enable the plaintiff to complete the works. According to the plaintiff, the works that have not been completed are minor and do not affect the use of the lighting system for the project.

d The plaintiff avers that in spite of requests the second defendant has wrongfully withheld the issuing of the takeover certificates.

I have considered the statement of claim and I find that it discloses a reasonable cause of action. At least it raises some question which should be decided at the trial. I have also considered the relevant facts involved in this claim. It is only in plain and obvious cases that recourse should be had to the summary process of O. 18 r. 19. See *Pertamina v. Kartika Ratna Thahir & Ors.* [1983] MLJ 136. I am satisfied that the plaintiff's claim is not frivolous, vexatious nor is it an abuse of the process of the Court. In *Tractors Malaysia Bhd. v. Tio Chee Hing* [1975] 2 MLJ 1, the question that was raised before the Privy Council was whether the action brought by the respondent against the appellant by a writ and statement of claim ought to be summarily dismissed as frivolous and vexatious. Lord Diplock in delivering the judgment of the Board said:

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The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution. Had the matter depended upon the contents of the statement of claim alone, their Lordships would have been loth to differ from the opinion of the Federal Court that, despite imperfections in drafting (which however might have been capable of cure by amendment) the statement of claim, at any rate as respects some of the claims to alternative relief, did raise questions of law that were sufficiently arguable to justify proceeding to trial. In refusing to submit the evidence to critical examination, however, the Federal Court erred in law. This makes it necessary for their Lordships to state briefly the facts disclosed by the evidence which, in their view, lead to the conclusion that the new action could not possibly succeed.

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I now turn to the question of stay. In my opinion the second defendant has no right in law to apply for stay as the claim against him is based on tort and as such, the matter cannot be referred to the arbitrator under Clause 38 of the contracts. In any event, the second defendant is not a party to the contracts and therefore, he cannot rely on Clause 38.

In the circumstances the second defendant's application must fail.

I shall next consider the first defendant's application that the proceedings in this action be stayed pending the reference of the plaintiff's claim to arbitration.

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Clause 38 of each of the two contracts contains an identical arbitration clause. Clause 38 states:

38 Settlement of Disputes - Arbitration

(1) If any dispute or difference of any kind whatsoever shall arise between the purchaser or the engineer and the contractor in connection with or arising out of the contract or the carrying out of the works (whether during the progress of the works or after their completion and whether before or after the determination abandonment or breach of the contract) it shall be referred to and settled by the engineer who shall state his decision in writing and give notice of the same to the purchaser and the contractor. Such decision in respect of every matter so referred shall be final and binding upon the purchaser and the contractor until the completion of the work and shall forthwith be given effect to by the contractor who shall proceed with the works with all due diligence whether notice of dissatisfaction is given by him or by the purchaser as hereinafter provided or not. If the engineer shall fail to give such decision for a period of ninety (90) days after being requested to do so or if either the purchaser or the contractor be dissatisfied with any such decision of the engineer then and in any such case either the purchaser or the contractor may within ninety (90) days after receiving notice of such decision or within (90) days after the expiration of the first named period of ninety (90) days (as the case may be) require that the matter or matters in dispute be referred to arbitration as herein provided. All disputes or differences in respect of which the decision (if any) of the engineer has not become final and binding as aforesaid shall be finally settled under the provisions of Arbitration Act 1952 (revised 1972) and/or any statutory modification or re-enactment thereof for the time being in force by one or more arbitrators agreed upon by both parties or if there is no agreement then appointed by the President of the Institution of Engineers (Malaysia). The said arbitrator shall have full power to open up review and revise any decision opinion direction certificate or valuation of the engineer and neither party shall be limited in the proceedings before such arbitrator to the evidence or arguments put before the engineer for the purpose of obtaining his decision above referred to. The award of the arbitrator shall be final and binding on the parties. Such reference except as to the withholding by the engineer or any certificate or the withholding of any portion of the contract price under subclause (1) of Clause 35 (terms of payment) hereof to which the contractor claims to be entitled or as to the exercise of the engineer's power to give a certificate under Clause 32 (Interim and Final Certificates) hereof shall not be opened until after the completion or alleged completion of the works unless with the written consent of the purchaser and the contractor. Provided always:

- a) That the giving of a final certificate under Clause 32 (Interim and Final Certificates) hereof shall not be a condition precedent to the opening of any such reference.
- b) That no decision given by the engineer in accordance with the foregoing provisions shall disqualify him from being called as witness and giving evidence before the arbitrator on any matter whatsoever relevant to the dispute or difference so referred to the arbitrator as aforesaid.

It is evident that in this case a dispute has arisen out of the contracts and in connection with the carrying out of works between the parties concerned. Under Clause 38 all disputes shall be settled by arbitration in accordance with the provisions of the Arbitration Act 1952.

Under s. 6 of the Arbitration Act, the first defendant is entitled to apply to this Court for a stay of proceedings pending arbitration. The Court has the power to stay the proceedings if it is satisfied that there is sufficient reason that the matter should be referred to arbitration. *Malaysian Government Officers' Co-Operative Housing Society Ltd. v. United Asia Investment Ltd. & Ors.* 3 [1972] 1 MLJ 113.

a Firstly, the Court must be satisfied that the application for stay is made before any other steps were taken by the first defendant. In the present case it is not in dispute that the first defendant has not taken any other steps in the proceedings before making the application for stay.

b Secondly, the Court must be satisfied that the first defendant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration. Mr. A.D. Rajah, Counsel for the plaintiff submitted that in order to satisfy the Court that the first defendant was and is still ready and willing to go for arbitration the first defendant must file an affidavit to that effect in support of the application for a stay. According to him he had gone through the first defendant's affidavit in support of the application for the stay and he found no averment that the first defendant was and is still ready and willing to arbitrate the matter. On this ground alone, he said, the application should be dismissed. Mr. C.K. Low, Counsel for the first defendant in reply referred to para. 15 of the first defendant's affidavit in support of the application for a stay and submitted that the averment therein was sufficient to show that the first defendant was and is ready and willing to arbitrate. Paragraph 15 of the affidavit states:

d In the circumstances I verily believe that the plaintiff's claim as alleged herein ought to be referred to arbitration and accordingly the plaintiff's claim herein is premature as well as frivolous, vexatious and an abuse of Court.

I find nothing in that paragraph to say that the first defendant was and is ready and willing to go for arbitration. *Halsbury's Laws of England*, 4th Edn., Vol. 2, states at p. 291:

e The applicant must satisfy the Court not only that he is, but also that he was at the commencement of the proceedings, ready and willing to do everything necessary for the proper conduct of the arbitration. He must also file an affidavit to this effect in support of his application for a stay, and unless the Court is satisfied on the point the application to stay must be dismissed ...

Atkin's Encyclopedia of Court Forms, 2nd Edn., Vol. 6 at p. 79 also states:

f The defendant applicant must show by affidavit that he was at the time when the proceedings were commenced, and at the time of his application is still, ready and willing to do all things necessary for the proper conduct of the arbitration...

In *AR Fernandez & Ors. v. National Union of Bank Employees* [1986] CLJ (Rep) 117 the Supreme Court, in its judgment at p. 125 said:

g It has been shown above that the union has not complied with s. 6, in that it has not stated in affidavit that it was ready and willing to do all things necessary for the proper conduct of arbitration. Therefore we are of the view that the learned Judge should not have made an order for reference to arbitration...

h After considering the first defendant's affidavit in support of the application for the stay, I am not satisfied that the first defendant was and is ready and willing to do all things necessary for the proper conduct of the arbitration. In view of the authorities cited above, the application for stay must fail on this ground alone.

i Mr. A.D. Rajah also submitted that fraud was alleged in the statement of claim. Mr. Chin contended however that the allegation of fraud was not made against the first defendant but against the second defendant. Mr. A.D. Rajah argued that the second defendant was an agent of the first defendant, and in law the fraud of an agent was the fraud of the principal. In para. 6 of the statement of claim, the plaintiff avers that the second defendant is the engineer

... appointed by the first defendant under both the Bersia and Kenering contracts to supervise the works under the said contracts and give all instructions and orders thereunder to the plaintiff on behalf of the first defendant ...

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I have no doubt that the second defendant was at all material times the agent of the first defendant.

I agree with Mr. A.D, Rajah that, in law the fraud of an agent is the fraud of the principal. *Halsbury's Laws of England*, 4th Edn., Vol. 4 at p. 675 states:

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The objects for which an architect or engineer is employed comprise the preparation of drawings and plans for the buildings or works in contemplation, and also the supervision of their construction, and he generally is the agent of the building owner or employer in both these respects, although his authority in supervising the work is limited by the terms of the building contract. If, however, the architect makes representation as to the accuracy of plans, or as to the quantities of work to be done, or other matters within his province, and does so fraudulently, and with the intention that they should be acted on, and they have actually been acted on to the prejudice of the contractor, the employer will be liable in respect of them, and cannot escape liability by relying on a clause in the contract purporting to throw the onus of inquiry as to such matters on the contractor. The employer will also be liable for any actionable misrepresentation made by the architect on these matters.

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In the present case the plaintiff is objecting to the matter being referred to arbitration on the grounds, *inter alia*, that it is alleging fraud against the second defendant. Section 25(2) and (3) of the Arbitration Act, 1952 gives the Court the power to give relief where the dispute involves a question of fraud and the Court may refuse a stay. But mere allegation of fraud is not sufficient in the circumstances of this case. The plaintiff has to prove a *prima facie* case of fraud; *Russel on the Law of Arbitration*, 20th Edn., p. 187.

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In *Russell v. Russell* [1880] 14 Ch. Div. 471, Jessel MR in his judgment at p. 481 said:

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There must be sufficient *prima facie* evidence of fraud, not conclusive or final evidence ...

In that case there was no evidence of fraud at all. There was an affidavit of the plaintiff, but Jessel MR decided that fraud was not proved and granted the defendant's application to refer the dispute to arbitration.

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In order to determine whether there is sufficient *prima facie* evidence of fraud in the present case, the Court need only to look at the pleadings and the affidavit evidence. In *Malaysian Government Officers' Co-Operative Housing Society Ltd. v. United Asian Investment Ltd. & Ors.* [1972] 1 MLJ 112, Abdul Hamid J, as he then was, in his judgment at p. 115 said:

Having regard to the circumstances of this particular case and in the light of the pleadings and the affidavits before this Court, I am satisfied that one of the substantial matters at issue is the question of the perpetration of fraud or something in the nature of fraud on the part of the first defendant company, a matter which it would seem to me to be outside the arbitrator's power to decide. In my view this is not the type of dispute that should be properly referred to an arbitrator. In other words I am satisfied that good grounds exist why this particular dispute should not be submitted to an arbitrator. I therefore refuse the application to stay proceedings to refer to arbitration.

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I shall now examine whether there is sufficient *prima facie* evidence of fraud in the present case. Para. 17 of the statement of claim sets out the particulars of the alleged fraudulent conduct of the second defendant. In its affidavit affirmed on, 17 January 1985, the plaintiff avers in para. 9(ii) as follows:

(ii) Under Clause 38 disputes are in the first instance, to be referred to the engineer and there is in the statement of claim allegation of fraud and negligence against the engineer and collusion against the first defendant. The engineer's conduct is being challenged. The second defendant

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- a* has by letter dated 23 November 1983 unilaterally and fraudulently cancelled variation order No. 1 under the Bersia contract and fraudulently maintains that no order for additional work has been issued under the Kenering contract long after the orders were complied with by the plaintiff and part payment made thereon by the first defendant ...

The letter written by the second defendant on 23 November 1983 is exhibited to the same affidavit. The letter *inter alia* states:

- b* ... In view of the above, variation orders 1 and 2 are hereby cancelled as they include positions of the work that has not been varied by an order of the engineer, but have been carried out in the manner originally specified. Accordingly this work must be classified measured and paid at the appropriate rates contained in the contract ...

The first defendant, in its proposed defence which is exhibited to its affidavit affirmed on 15 December 1984, states in para. 6 that:

- c* ... no authorisation was given for the issuance of supply and delivery schedules, installation schedules and **variation orders** ...
(Emphasis added)

In the same paragraph the first defendant states that alleged variation orders are not variation orders within the meaning of the two contracts.

- d* From the letter written by the second defendant, works that had already been done by the plaintiff under the contract were treated as cancelled by the second defendant and to be considered as having been paid at the rates specified in the contract. *Hudsons Building & Engineering Contracts*, 8th Edn., at p. 291 states:

- e* It would, it is submitted, be strong evidence of fraud if an employer, desiring alterations or additions to be made by a contractor, and knowing that they would cost more than the contract price, himself, or by his engineer or architect, were to stand by and see the expenditure going on upon the alterations or additions and then, taking the benefit, refuse to pay upon the ground that proper orders had not been obtained.

- f* In my opinion there is sufficient *prima facie* evidence of fraud in this case. On this ground, too, the Court will not exercise its discretion to grant a stay of proceedings to enable the first defendant to refer the dispute to arbitration.

- g* Mr. A.D. Rajah's next contention was that a stay should be refused to avoid plurality of proceedings. According to him since the action against the first defendant was in contract and against the second defendant in tort, a stay should be refused. I agree with Mr. A.D. Rajah's contention. In the circumstances of this case, a stay should be refused to avoid plurality of proceedings. In *Tauton-Collins v. Cromie & Anor.* [1964] 2 All ER 332 Lord Denning, in his judgment at p. 333 said:

It seems to me most undesirable that there should be two proceedings in two separate tribunals - one before the official referee, the other before an arbitrator - to decide the same questions of fact. If the two proceedings should go on independently, there might be inconsistent findings.

- h* I respectively agree with the passage quoted above.

For the reasons stated above, I confirm the decision I made in chambers in respect of the two applications. The defendants will pay the cost of further argument to the plaintiff.

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Also found at [1992] 1 CLJ 190